

# Best Practices Under Revised Article 9



by Trish Bogenrief

**W**e are entering our third year under Revised Article 9 and have learned some very important lessons about searching and filing that we want to share with secured lenders.

This revision has brought us many uniformities — national form, standard search logic, model administrative rules and a filing officer rejection chart created by the International Association of Commercial Administrators (IACA). They are available at [www.iaca.org](http://www.iaca.org). During this transition period there are some practices that we consider best practices.

## **Pre-filing searching and document gathering**

- ▶ Order copies of the Articles of Incorporation and all Amendments to those Articles to determine the “correct” debtor name for registered entity debtors.

Corporate name verification searches can be conducted on private databases for less cost, but several states make data entry changes to the true entity name, as it appears in the Articles of Incorporation (e.g., John Hancock Insurance Company, LLC would be entered as Hancock, John, Insurance Company, LLC). Filing on this name variation may result in your financing statement not being

filed on the “correct” debtor name, possibly making it ineffective. The choice of a filing name is a business decision. Note that this is also a way of documenting the proper RA9 filing location and obtaining the organizational ID number.

- ▶ Obtain “formation documents” from the debtor for nonregistered entity debtors.
- ▶ Obtain copies of individual debtor’s driver’s license, Social Security card and passport. Only the name and type of form are needed. A customer should be asked to black out or otherwise eliminate all other information.
- ▶ Obtain from debtor front page of both federal and state income tax submissions for 10 years to learn what name to search under for federal and state tax liens. The type of form, year filed and taxpayer name are needed. Customers should black out all other information.

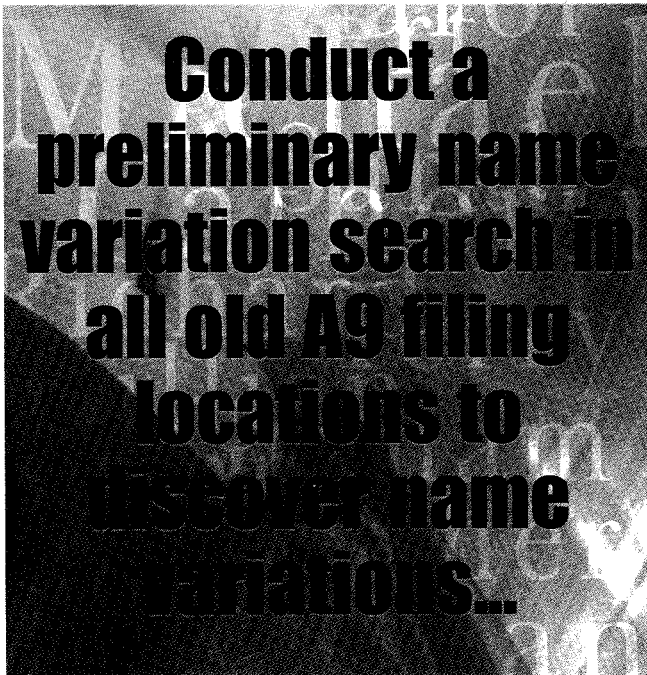
Portfolio 638 — 2<sup>nd</sup> Federal Tax Collection Procedure, under 6. “Adequacy of NFTL (Notice of Federal Tax

*(Continued on page 16)*

Lien) Drafting” directs that the following procedures will cause the filing office not to reflect the tax lien if the office is using the RA9 standard search logic as suggested in the model administrative rules. Many filing offices use this search logic.

The IRS guidelines for preparing the NFTL provide the following:

- More than one assessment may be entered on Form 667Y, if each is recorded as a separate line item entry;
- The taxpayer’s correct name should be entered on the form;
- Initials should be avoided. Known aliases can be added to the name listed on the account;
- The abbreviation “d/b/a” should be used only when the taxpayer is a sole proprietor;
- If the NFTL reflects employment taxes of a partnership, the words “a partnership” should appear after the partnership name, and all known general partners should be listed;
- When the NFTL is filed against a corporation, the words, “a corporation” should appear after the corporate name; and
- This form should be signed by the official designated to sign Form 668Y.



Conduct a preliminary name variation search in all old A9 filing locations to discover name variations from “pre-effective financing statements” that may still be effective under RA9. These can be done in several jurisdictions or on private databases if the filing office does not offer this type of searching as an option.

If you chose not to run these name-variation searches, be aware that the new standard search logic is close to an

“exact name” search. If a pre-effective financing statement was filed on a variation, it may not reflect on a search, but it may still be effective. In addition, the implementation of standard search logic is *not standard*. The reasons are varied, but generally it is a product of applying new search logic to a legacy system. The result for the secured party can be “hidden liens.”

- Order UCC searches in all old A9 filing locations on all name variations found, plus on the “correct” RA9 name determined from the Articles, formation or other documents.
- Order federal and state tax lien searches on all names revealed from the last ten years’ tax records, as taxing bodies file on these names only.

Consider searching with the ending “a corporation” if the debtor is a registered entity, or “a partnership” if the debtor is a partnership. Also consider possible name variation searches if your debtor filed its tax return with a “d/b/a,” or search all known partners, if the debtor is a partnership. It is a written procedure for the IRS to file adding these endings; RA9 standard search logic will not find them. Some filing offices realize a tax lien may not be found, and have either programmed their systems to ignore the additional ending or do not enter it in their systems. Do *not* rely on this in most offices.

- Order judgment, pending suit, real-estate lien and bankruptcy court searches from all locations where debtor does business or resides on all name variations found.

The amount of due-diligence searching will be determined by the secured party and its legal counsel based on the value of the transaction and the relationship with the debtor. This serious business decision needs to be addressed very early in the process. The following search options are necessary to prevent unwanted surprises after closing, and represent our best practices recommendation.

#### **Filing**

Determine the proper RA9 filing location by obtaining copies of Articles (if a registered entity, you will be filing in the state of incorporation) or other formation documents (if a non-registered entity, you will be filing in the state where the chief executive office is located) for entities. If your debtor is an individual, you will be filing in his state of residence.

Determine if your transaction has real estate-related collateral. If so, file at the local level where the real estate-related collateral is located.

Use the national form and complete all relevant areas. It is imperative that you address boxes e, f and g for entities. If you do not, they will be rejected. Do not put

*(Continued on page 18)*

more than one debtor name in a section, e.g., if you have two debtors, you will be completing section 1 and section 2 on the initial financing statement.

Review the form carefully. If your filing is a fixture, manufactured-home, public-finance transaction or a transmitting utility filing, check the appropriate boxes on both the first page and the addendum. Real-estate transactions must have the special section completed and an appropriate description of the real estate.

Consider electronic filing options. This will save you time and money. This is particularly important for PMSI filings.

Consider fax filing if electronic filing is not available.

When amending pre-effective financing statements, first ensure that they are filed in the proper RA9 location, and that the debtor name(s) are the "correct" name under RA9. If already in the proper location, then use an Amendment form. If not, you must "in lieu" to the proper RA9 location. You can either do your amendment on the "in lieu" form or file the "in lieu" and then file the amendment to that form when you get your file number.

When filing your "in lieu," remember that this initial financing statement must contain not only the required "in lieu" information, but also the collateral statement. Without the collateral statement, the financing statement is ineffective.

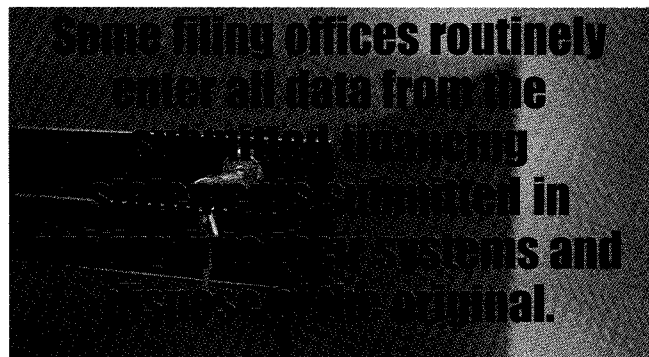
Use a form preparation product on the Web. These products walk you through the requirements by jurisdiction. Some will allow you to transmit the filings electronically to the service provider for immediate filing by whatever method you indicate, including electronic filing. When using a service provider, fees will be advanced for you, eliminating the main reason for rejection: improper fees.

Completing the national form correctly and completely is the key to successful filing under Revised Article 9. Your service provider should keep you abreast of jurisdictional rules and other nuances that can cause a delay in securing your position.

#### **Due diligence after your filing**

- Conduct a search to reflect your financing statement on the "correct debtor name," and keep that documentation in your loan portfolio. In states that offer an RA9 search, that is the type you should order, as it will also show all effective financing statements filed after RA9 became effective. If the filing office does not offer an RA9 search, order a regular search, as that will be the "standard" search for RA9 purposes.
- You will be sure that future interested parties will be able to find your financing statement on file if they search the "correct" debtor name.
- You will be made aware of any intervening financing statements that may have been filed since your initial due-diligence search.

- Your search after filing will alert you to any data-entry errors made by the filing office. It is imperative that you review the search results to ensure that the filing office has not re-entered your submission and made entry errors in your collateral, debtor or secured party information.



Some filing offices routinely enter all data from the financing statements submitted in writing into their systems and dispose of the original. They will return their re-keyed information as your acknowledgment. You have 30 days in which to notify them if they made a data-entry error, and they will make a filing office correction. If you notice an error after the 30-day period, you must file an amendment to correct the data entry error. These same filing offices now accept filings electronically and these submissions are downloaded directly to their systems without any re-keying by the filing office. Utah and Wyoming practice this, but other states have also done so whenever their optical imaging/scanning equipment has been down for more than two days, e.g., state of Washington from October 2001 to April 2002.

- If you have filed an "in lieu" financing statement, ensure that you have copies of searches in your loan portfolio of all financing statements that you have "in lieu." Remember, by statute, one year after normal lapse the filing office no longer keeps copies of these financing statements. The copies in your loan portfolio are your proof of filing.

Searching to reflect your filing is your insurance that you have perfected your secured position correctly and are in full compliance with RA9 filing requirements. Customers who routinely chose this final step have far fewer problems.▲



*Trish Bogenrief is the vice president of LexisNexis Document Services Inc./ Corporation Service Company, Springfield, IL. She was chairman of the User/Service Provider Committee to the Article 9 Filing Project, formed by the National Conference of Commissioners on Uniform State Laws to augment the Drafting Committee.*